RECEIVED

APR 2 5 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	DOCKET FILE COPY ORIGINAL
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AT&T") hereby submits its reply comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.

I. The Record Supports Eliminating the 10 MHz Small Business Set-Aside and Confining all Preferences to the F Block

Almost all commenters agree that the small business preference rules of the C block auction have not produced their intended result -- economic diversity of spectrum ownership -- but rather have provided an opportunity for speculation and litigation that may have adverse repercussions on wireless markets for many years. Most of these commenters are the very entities the Commission intended to help through its C block set-aside.[1/] They nevertheless complain that they were unable to compete with the "large moneyed interests" that took "advantage of existing rules to exploit any opportunity to dominate the PCS

[1/] See e.g., Comments of the National Telephone Cooperative Association at 4; Comments of Omnipoint Corporation at 4-5; Comments of Telephone Electronics Corporation at 4; Comments of Point Enterprises, Inc. at 2; Comments of Iowa L.P. 136.

business."[2] Surprisingly, however, these parties believe that the Commission can simply fix the C block problems by, among other things, excluding large investors, excluding "entrepreneurs", redefining "small", redefining rural telephone company, tightening the attribution rules, retaining the attribution rules, eliminating bidding credits, increasing bidding credits, restricting winnings, increasing upfront payments, decreasing upfront payments, attributing C block winnings to F block applicants, and setting aside the D and E blocks, as well as the F block.

As most of these commenters participated in the arduous process of establishing the C block policies, they are well aware that the Commission did not adopt any of its rules without great thought about the potential effects they might have on designated entities and the wireless marketplace. The Commission recognized that its attribution rules could result in the use of "fronts" by large companies, but weighed this possibility against the disadvantages of precluding investment in small businesses altogether. Indeed, each of the "quick fixes" now proposed by disappointed C block participants were contemplated and rejected, usually for very good reasons.

The problem with the C block auction has little to do with whether the Commission's ownership rules are too tight or too loose. If the Commission restricts investment as some parties propose, the winning PCS licensees will lack the financial

---

[2] Comments of Rendall and Associates at 3.

ability to compete in the marketplace or make the government's installment payments. If the Commission retains the existing rules, no "true" small businesses will end up with significant spectrum. In either case, the construction of facilities and the onset of competition will be delayed as a consequence of underfunding or litigation from disgruntled parties.

The C block experience demonstrates that, however commendable the Commission's intentions, a small business set-aside is not an advisable mechanism to fulfill Congress's mandate regarding designated entities. Rather, the Commission should open the remaining 10 MHz blocks to all competitors to ensure that the licenses end up in the hands of the parties that value them the most.[3/]

In any event, if the F block is closed to "non-entrepreneurial" businesses, the Commission should conduct a separate D and E block auction. While the Commission may be willing to contend with the anticompetitive results of speculative bidding and the almost certain litigation associated with setting aside spectrum for certain entities, it makes little

---

[3/] Most parties agree that the Commission should eliminate the race and gender-based provisions from its F block rules. National Telecom PCS, Inc. is incorrect that the Commission has failed to undertake to create the factual record required by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). See Comments of National Telecom PCS, Inc. at 1-2. Indeed, as AT&T noted in its initial comments, the Commission has been attempting to gather such a record for more than two years. This admirable and painstaking effort has been unsuccessful, however. The Commission should not risk the inevitable litigation and auction delays that would result from application of race and gender-based measures to the F block auction.

sense to project these problems onto the remaining spectrum blocks. Moreover, holding a consolidated auction with one block closed to many bidders might encourage F block applicants to engage in strategies designed to increase prices in the D and E blocks. Such action ultimately would discourage participation in the D and E blocks.

If the Commission determines that small business preferences are appropriate, it should provide a bidding credit and installment payment plan for qualified bidders in the F block. The installment payment plan should be restructured, however, to increase the down payment, reduce the moratorium on principal, and increase interest rates toward market levels. As U S WEST's economic consultant Robert G. Harris correctly notes, the current installment payment rules promote "speculation, moral hazard and adverse selection, by transferring a substantial amount of risk from the licensee to the Commission."[4/] Because bidders do not have to put down much money at the outset, they can default on their installment payments and declare bankruptcy if it turns out they are unable to compete. Thus, Professor Harris observes, "purchasing spectrum using installment payments becomes, in the short term, a one-way bet backed by the federal government."[5/]

The Commission should not, under any circumstances, apply any preferences to the D and E blocks. As explained above, bidding credits and installment payments provide perverse

---

4/ Comments of U S WEST, Attachment A at 11.

5/ Id. (emphasis omitted).

incentives to bidders, and the Commission should be careful not to skew the auction results on all the remaining PCS blocks. "If bidding credits and installment payments are added to the D and E blocks, it will serve to exclude many of the bidders who value the licenses most highly and tend to allocate licenses to bidders with the highest costs of capital."[6] This would be directly contrary to Congress's objective of promoting efficient use of the spectrum, rapid deployment of services and technology, and recovery for the public of value from the use of the spectrum.[7]

II. The Commission Should Eliminate all Spectrum Caps Except the General 45 MHz Cap and Relax the Associated Attribution Rules

Many parties, both large and small, advocate elimination of the cellular/PCS cross-ownership rule and 40 MHz PCS spectrum cap in favor of a single 45 MHz spectrum cap. The comments submitted by the Cellular Telephone Industry Association ("CTIA"), for instance, and its attached 1993 study prepared by Charles River Associates, provide a sound economic rationale for relaxing the rules. As CTIA states, "the risks to innovation from erring on

---

[6] Id. at 21-22.

[7] Id. at 21. Auction Strategy, Inc. argues that the Commission should extend installment payments to the D and E blocks because, like the C block experience, installment payments will result in a more robust auction and net more revenues for the Commission. Comments of Auction Strategy, Inc. at 2. This party neglects to consider, however, that, given the substantial possibility of massive default, higher auction bids do not necessarily translate into higher auction revenues. Moreover, the Commission now is facing a situation where the C block preferences have encouraged the winners to overbid to an extent that may render them unable to provide real competition in the marketplace.

the side of restrictive eligibility rules are greater than the risks of increased concentration incurred by erring in the other direction."[8] Likewise, the Ad Hoc Rural PCS Coalition argues that the 45 MHz spectrum cap is an adequate check on the power of cellular licensees to influence the broadband PCS market.[9]

A number of commenters also contend that the Commission should relax its spectrum cap attribution rules. ALLTELL Corporation, for example, notes that the rules are overly complex and in some respects, redundant. It proposes that the Commission declare that all non-controlling interests of less than 49 percent are non-attributable. As AT&T stated in its comments, the Commission's rules already provide for attribution of any controlling interest and, thus, a control test would not render the rules more complex or burdensome. Indeed, it would eliminate one step from an already difficult process.

Most of the parties that favor retaining or strengthening the spectrum cap and attribution rules believe that the restrictions enhance their ability to compete in the PCS marketplace. There is no basis for their fears that allowing cellular operators to acquire 10 MHz more of in-region PCS spectrum will affect their chances at auction, however, and there is absolutely no grounds for their speculative concerns that such

---

[8] Comments of CTIA at 5.

[9] Comments of the Ad Hoc Rural PCS Coalition at 15.

spectrum might be "warehoused."[10] Indeed, given the imminent competition from three PCS licensees and existing competition from another cellular licensee, choosing to warehouse one or two 10 MHz licenses -- after paying premium prices at auction -- is entirely counter-intuitive.

The Commission should not, in any event, grant BellSouth's request to allow Bell Operating Companies ("BOCs") to acquire PCS spectrum without attributing the 25 MHz of cellular spectrum they hold in structurally separated subsidiaries. Even with cellular service provided through affiliated companies, the BOCs would have ample opportunity to capitalize on their cellular spectrum in markets where they also hold PCS frequencies. For example, BOCs market their cellular services under their LEC trade names and they receive the full financial benefit of their cellular operations.

Moreover, contrary to BellSouth's suggestion, the cellular structural separation rule remains lawful today.[11] Indeed, the Telecommunications Act of 1996 explicitly leaves intact the Commission's authority to require separate subsidiaries when the

---

[10] See e.g., Comments of Gulfstream Communications, Inc. at 7.

[11] BellSouth wants it both ways. It argues, on the one hand, that its cellular spectrum should not be attributed because it is held in separate subsidies and, on the other hand, that the cellular separate subsidiary rule must be abolished. It is not clear whether BellSouth would agree to attribution if the rule were eliminated.

public interest warrants.[12] In addition, the decision of the United States Court of Appeals for the Sixth Circuit in Cincinnati Bell Tel. Co. v. FCC does not require the Commission to eliminate its cellular separate subsidiary requirement. The Court's holding was based on the failure of the Commission to explain adequately its decision not to adopt a similar rule for BOC provision of PCS. This disparate treatment makes perfect sense, however: in contrast to the substantial geographic overlap in BOC landline and cellular holdings, BOCs generally have minimal PCS interests in their monopoly wireline territories. Because the danger of discrimination and cross-subsidy is much more pronounced when BOCs control both landline and wireline facilities in the same region, a decision by the Commission to retain the cellular separate subsidiary rule is completely reasonable.

CONCLUSION

For the foregoing reasons, AT&T urges the Commission to open the three 10 MHz PCS blocks to all bidders. If the Commission decides to grant preferences to certain entities in the F block,

---

[12] The 1996 Act enumerates certain services for which a BOC must establish a separate affiliate but permits the Commission to require the same or other safeguards as necessary for additional services. Telecommunications Act of 1996, Pub. L. No. 104-104 (Feb. 8, 1996), § 151, adding 47 U.S.C. § 272(a)(2); Id. § 151(a), adding 47 U.S.C. § 272(f)(3) ("Nothing in this subsection shall be construed to limit the Authority of the Commission under any other section of [the Communications Act of 1934, as amended] to prescribe safeguards consistent with the public interest, convenience, and necessity.); see also Letter from Hon. Ernest F. Hollings to Hon. Reed E. Hundt and FCC Commissioners at 3 (Feb. 29, 1996).

it should not, under any circumstances, extend such preferences to the D and E blocks. In addition, the Commission should conduct a separate D and E block auction if it decides to close the F block to "non-entrepreneurial" businesses. Finally, AT&T requests that the Commission eliminate the cellular/PCS cross-ownership rule in favor of a single 45 MHz spectrum cap and adopt a control test for determining which interests are attributable for purposes of the cap.

Respectfully submitted

AT&T WIRELESS SERVICES, INC.

Cathleen A. Massey / by SJS

Cathleen A. Massey
Vice President - External Affairs
Douglas I. Brandon
Vice President - External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036
(202) 223-9222

April 25, 1996

F1/52101.1

CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 25th day of April, 1996, I caused copies of the foregoing Reply Comments of AT&T Wireless Services, Inc. to be served on the following by first-class mail, postage prepaid, or by messenger (*) to the following:

Tanya Butler

Michele Farquhar*
Federal Communications Commission
Chief
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Kathleen Ham*
Chief, Auctions Division
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Sue McNeil*
Federal Communications Commission
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Rosalind Allen*
Federal Communications Commission
Associate Chief
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Gregory Rosston*
Federal Communications Commission
Office of Plans and Policy
1919 M Street, N.W., Room 822
Washington, D.C. 20554

ITS*
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037